Nos. 94-1268 & 94-1314

FEB 24 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOINT SCHOOL DISTRICT NO. 241, *et al.*,

Petitioners,

—v.—

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her child SAMUEL HARRIS.

CITIZENS PRESERVING AMERICA'S HERITAGE, INC., *et al.*,

Cross-Petitioners,

—v.—

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her child SAMUEL HARRIS.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether public school officials, who must and do retain a high degree of control over the precise contents of a school commencement program, can authorize students to transform this government program into a religious service without thereby violating the Establishment Clause.

2. Whether a government program in which only one religious group is allowed to speak can be considered a public forum.

3. Whether the Free Speech Clause authorizes a religious group to use a government program for proselytizing, even though this clearly violates the Establishment Clause.

LIST OF PARTIES

Phyllis Wright Harris filed this case, as her complaint states, "on her own behalf and on behalf of her three minor children, Beverly, Billy, and Samuel Harris." At the time of filing, all three children were students in the defendant school district. However, Beverly has since graduated from high school and Billy no longer matriculates in this school district. The only remaining student with standing to pursue this case is Samuel Harris, and Samuel graduates on June 2, 1995.

The caption used by the Harrises on this brief in opposition reflects the current status of the parties. For some unexplained reason, petitioners and cross-petitioners have deleted Billy from their captions, but not Beverly.

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Respondents submit this brief in opposition to the petition and cross-petition for *certiorari* in Nos. 94-1268 and 94-1314.

STATEMENT OF THE CASE

Petitioners' statement of the case is incomplete. Several critical facts are omitted, and some statements are erroneous. A more accurate statement follows.

1. This case was filed on April 12, 1991, by Phyllis Wright Harris on behalf of herself and her three children, Beverly, Billy, and Samuel Harris. Beverly graduated in 1991 from Grangeville High School; Billy no longer attends school in this district; and Samuel, a senior this year, graduates on June 2, 1995. Thus, after that date, none of the Harris children will any longer be a student in petitioners' school district.[1]

2. Beverly Harris was a senior at Grangeville High School when this case was filed in 1991. School officials permitted Beverly's class to vote on whether religious practices would be inserted into the school's upcoming commencement ceremony. Beverly's class opted to insert two prayers and one religious hymn into the program. On Beverly's behalf, a preliminary injunction was sought in district court to halt these religious activities, but the court denied the injunction. Beverly, therefore, had no choice but to endure religious practices in order to participate in one of

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[1] According to cross-petitioners, this case presents a "timely opportunity" to decide certain First Amendment issues. Cross-Pet. at 14. Given Samuel's graduation date, this is not necessarily true. Indeed, under this Court's decision in *Weinstein v. Bradford*, 423 U.S. 147 (1979), it would appear that this case may well become moot when Samuel graduates.

the most important events of her life.[2]

3. This Court has held that "teachers and principals must and do retain a high degree of control over the precise contents of the [graduation] program." *Lee v. Weisman*, 505 U.S. __, 112 S.Ct. 2649, 2660 (1992). It is therefore significant that the school district in this case concedes that it "allow[s] the students to dictate the content of graduation," and that "[n]o implied restrictions are placed on the graduating seniors" in this regard. Pet. at 6. The principal of Grangeville High School testified that, under the school district's written policy, students are authorized to transform the *school's* graduation program into "a religious service." CR 51 at 112.[3] The superintendent of schools, who wrote this policy, testified that the policy authorizes students to dictate the content of these ceremonies, "no matter how religious they are." CR 50 at 58.

4. As the court below noted, the public school underwrites these commencement programs with taxpayer funds, providing "the building, chairs, platform for speakers, sound system, secretarial help, and janitorial staff," and also defrays the cost of the written Program in which the prayers and hymns are listed. Pet.App. B-21, B-19. Thus, the most important facts are not in dispute: Children are allowed, by a simple majority vote, to transform a government program into a religious service (containing as much denominational dogma as they wish); paid for by government funds; sponsored by the school district; in which school officials participate, and over which these officials have ultimate control.

5. The prayers that were given during Beverly's cere-

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[2] Petitioners state that "Mrs. Harris' oldest child [Beverly] left Grangeville High before graduating." Pet. at 7-8. This is erroneous.

[3] The designation "CR" refers to the clerk's record in the district court.

mony[4] were Christian prayers. They invoked Jesus and the Holy Spirit. They used the word "Lord" 15 times. CR 48 at 7. The religious hymn that also was inserted into Beverly's graduation program contained such messages as "We want You to find us living what is true. Lord, remind us who we are in You." No evidence was introduced in the district court indicating that this hymn had anything other than a religious purpose and effect.

6. In support of her motion for a preliminary injunction in 1991, Beverly testified: "I feel like school officials are telling me that I am not as good as the other students. I also feel as if I am being pressured to conform, and to accept someone else's version of what is an acceptable religious belief." Beverly also testified that, when she voiced her opposition to these religious activities during the school's voting process, she was retaliated against by other students. "Now I am being treated like an outcast." CR 1(F).

7. Petitioners state that Grangeville's 1990 senior class (when Beverly was a junior) "declined to include any non-secular music, prayer or speech" in the school graduation program. Pet. at 7. This is erroneous. As the written Program records, this event contained an invocation delivered *by clergy* and students sang a "Musical Benediction." CR 48, p. 8, No. 10.

8. Cross-petitioners (the student-intervenors) claim that "no one who attends a graduation ceremony in District No. 241 is ever asked to participate in any prayer during the graduation ceremony." Cross-Pet. at 3. This statement is

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[4] The only hearing held in this case occurred in 1991. Accordingly, the facts adduced at this hearing constitute the record. All parties concede that the religious activities that occurred during Beverly's ceremony are illustrative of the religious activities authorized by the school district's policy.

misleading. Remaining respectfully silent during prayer is conventionally viewed as "signif[ying] . . . participation or approval of it." *Lee v. Weisman*, 112 S.Ct. at 2658. In this sense, Beverly was not only asked to -- she was compelled to -- participate in two prayers and a religious hymn at her graduation. Similarly, Samuel's classmates have voted to compel him to participate in religious activities this June 2. Any notion that these children were not asked to participate in religious activities "is formalistic in the extreme." *Id.* at 2659.

9. Cross-petitioners claim that the Grangeville High School graduation ceremony is a public forum. The record refutes this claim. It is undisputed that a religious majority dictates the ceremony's content and monopolizes the podium. Only one view is heard, and all others are barred. Pet.App. B-27. Therefore, this is not a public forum. Even the school district does not contend that its graduation ceremony is a public forum.

REASONS FOR DENYING THE WRIT

Public school students have no independent right to dictate the content of a *school's* commencement program. No one in this case disputes that fact. *See Lee v. Weisman*, 112 S.Ct. at 2660 (school officials "must and do retain a high degree of control over the precise contents of the [graduation] program").[5]

Without abdicating its ultimate authority, the Grangeville school district has nonetheless allowed students to "dictate" the school's graduation program. Students have even been delegated the authority to transform the school's pro-

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[5] *Cf. Bethel School District v. Fraser*, 478 U.S. 675, 683 (1986)("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board").

gram into a religious service. Armed with this power, Grangeville students have fashioned graduation programs that would make the activity in *Lee v. Weisman* appear sterile. These programs have included denominational, clergy-delivered prayers; denominational prayers offered by students; and religious hymns -- sometimes all in the same program.

The Ninth Circuit was clearly correct in declaring this scheme unconstitutional. There is no reason for this Court to review this decision.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ISSUE PRESENTED BY THIS CASE

Petitioners and cross-petitioners contend that the decision of the Ninth Circuit in *Harris* conflicts with the Fifth Circuit's decision in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (1992), *cert. denied*, 113 S.Ct. 2950 (1993). However, these decisions are significantly distinguishable. True, both cases involve the broad question of school sponsorship of student-initiated prayer in school commencement exercises. But the actual issue in *Jones* was the facial validity of a school policy that permitted high school seniors to deliver "nonsectarian, nonproselytizing invocations at their graduation ceremonies." *Id.* at 964, 969 n.10. In upholding this policy, the court admonished that the plaintiffs could seek further relief if this policy were violated. *Id.* at 969 n.10.

In sharp contrast, *Harris* considered a policy that allows high school seniors to inject all of the following religious activities into the school ceremony: (1) as many denominational, proselytizing prayers as the students wish, (2) all delivered by clergy, and (3) an unlimited number of religious hymns and other religious messages. As petitioners con-

cede, the Grangeville policy "does not attempt to insure non-sectarian or non-proselytizing content" of the school's graduation program, and there are "[n]o implied restrictions" on the amount of religious content it can contain. Pet. at 5. In fact, the school district "allow[s] the students to dictate the content of graduation." *Id.* at 6. There is nothing in *Jones* suggesting that the Fifth Circuit would -- or that any court would -- sustain a policy such as this. In any event, *Jones* did not consider such a policy.

II. THE DECISION BELOW IS CORRECT AND CONSISTENT WITH THIS COURT'S PRECEDENTS

A. Petitioners' Policy Violates The Establishment Clause

Petitioners' policy contains an inherent constitutional flaw. It rests on an erroneous concept: that a government activity ceases to be a government activity when a religious majority is allowed to control it. The framers of the Constitution chose a different path for our nation. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

Hundreds of activities long recognized as unconstitutional would be officially sanctioned under Grangeville's scheme. All that government officials need do is bind themselves to the outcome of a vote. If the majority then votes to usurp the government activity for a private religious purpose, the government would be obligated to finance and sponsor it. In the school context, majorities could vote to begin every class with prayer, and vote to post the Ten Commandments in every classroom. Indeed, this same prin-

ciple would permit each agency of government to allow constituents to insert their own religious activities into every government program.

The prayers (and other religious activities) inserted by students into Grangeville's official graduation program constitute state action in every relevant sense. They are advertised on the state's Program, included as an integral part of the government event, and are able to be offered from this podium only because the government has provided the financial and supervisory resources. Moreover, given that the government has the ultimate authority to prohibit these prayers from the official program, the decision to include them precludes any claim of government neutrality.[6] To paraphrase the Court's most recent state action decision: "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply [deferring to a majority vote]." *Lebron v. National Railroad Passenger Corp.*, 63 U.S.L.W. 4109, 4116 (Feb. 21, 1995).

Petitioners contend that a school district can somehow "remain neutral [while] allow[ing] the students to dictate the content of graduation." Pet. at 6. This cannot be true. Every time children dictate the insertion of religious activity into a school program, the school loses its neutrality. It is not the prayers, of course, that violate the Constitution; it is their placement into an official government program. *Compare Engel v. Vitale*, 370 U.S. 421 (1962), with *Board of Education v. Mergens*, 496 U.S. 226 (1990).

Students at Grangeville High who desire it are free to organize a private, religious baccalaureate service before or after graduation. But, contrary to petitioners' assertion,

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[6] Thus, cases such as *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), are patently inapposite.

school officials violate their constitutional obligation of neutrality when they allow prayers to be included in the government program. "The Constitution mandates that the government remain secular, rather than affiliating itself with religious beliefs or institutions . . . ." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 610 (1989). *See also Abington School District v. Schempp*, 374 U.S. 203, 226 (1947)("In the relationship between man and religion, the State is firmly committed to a position of neutrality").

Government neutrality is particularly important in the public school. "'[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Epperson v. Arkansas*, 493 U.S. 907, 104 (1968), quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). *See also Edwards v. Aguillard*, 482 U.S. 578, 583 (1987)("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause" in public schools).

Petitioners' religious activities -- and these prayers *are* the school district's -- violate the Establishment Clause. The fact that students initiate them does not change the fact that they are being offered as part of the government's own program, thereby forfeiting government neutrality. Church and state have been joined.

B. The Free Speech And Free Exercise Claims Raised In This Case By Cross-Petitioners Have Been Repeatedly Rejected By This Court And Were Properly Rejected By The Court Of Appeals

Petitioners make no Free Speech or Free Exercise argument, but cross-petitioners do. Cross-petitioners contend that, even if these religious activities otherwise constitute

Establishment Clause violations, they are saved by the free speech and free exercise rights of the students who want these prayers included in the school program.

This argument is wrong on the facts and wrong on the law. It is wrong on the facts because cross-petitioners are not merely seeking the right to engage in private religious expression. They are demanding that the state promote, sponsor and finance that religious expression by including it in an official school program. It is also wrong on the law. As this Court pointedly noted in *Abington School District v. Schempp*, 374 U.S. at 226, "[w]hile the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the state to practice its beliefs" (emphasis in original).

Cross-petitioners' only response to this well-established law is to argue that a tension exists in this case between their individual rights and the Establishment Clause. But a similar tension exists in *all* Establishment Clause cases. By definition, the Establishment Clause restricts a certain manner of expression: namely, religious expression sponsored by the state. Free speech stops at this wall. Simply put, there is no right to compel a violation of the Establishment Clause. *See Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973)(citations omitted):

> [T]his Court repeatedly has recognized that tension inevitably exists between the Free Exercise and Establishment Clauses . . . . As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion.

See also West Virginia Board of Education v. Barnette, 319 U.S. at 638; *Lee v. Weisman*, 112 S.Ct. at 2657-58, 2660.

Cross-petitioners either ignore or fail to grasp the distinction between private religious speech and state-sponsored religious activity. Thus, they claim: "Where the impetus for religious activity is purely of private initiative and design . . . there is no state action and the Establishment Clause does not proscribe the conduct." Cross-Pet. at 19.

The flaw in that reasoning is apparent. A majority can initiate and design religious practices, but it cannot use the machinery of the state to promote them. Prayers (and other religious practices) inserted into a public school graduation program cross the line from private speech to public ritual.[7] The notion that publicly sponsored prayers become constitutional whenever the majority wants them is to say, in effect, that our constitutional safeguards, including the Establishment Clause, can be overruled by majority vote. That is not the premise of the Constitution and it has never been this Court's view.

Cross-petitioners make a similarly flawed argument when they contend that the disclaimer that appears on the written graduation Program somehow cleanses the constitutional violation occurring on the podium. However, this argument too has been consistently rejected by the Court, which has properly recognized that no amount of disclaim-

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[7] Cross-petitioners make the same fundamental error in relying on *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), in support of their free speech claim as when they rely on *Board of Education v. Mergens*, 496 U.S. 226, in the context of free exercise. In both *Tinker* and *Mergens*, schools were constitutionally obligated to tolerate certain student speech on a nondiscriminatory basis. Nothing in those cases support what the students want to do here: compel the school to sponsor and finance their religious activity and include it in the school's own program. Indeed, *Tinker* and *Mergens* illustrate what Grangeville's response to this request should be.

ing "can blind us" to a clear Establishment Clause violation. *Stone v. Graham*, 449 U.S. 39, 41 (1980).

Finally, cross-petitioners argue that Grangeville's graduation ceremonies are public fora and, consequently, the students' religious practices cannot be subjected to "viewpoint-based speech restrictions." Cross-Pet. at 20. There is no basis in fact for claiming that this podium is a public forum. Indeed, the school district itself eschews the notion that it has created a public forum, given the responsibility the district would then have to open it to unfettered discourse.

"The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Neither by word nor deed has Grangeville opened its graduation podium to unlimited discourse. Public discourse does not occur. The only speech permitted is the religous majority's speech. As the Ninth Circuit correctly noted, "[n]o matter what message a minority of students may wish to convey, the graduation forum is closed to them." Pet.App. at B-27. This critical fact is not in dispute, and this fact precludes the graduation ceremony from being considered a public forum.

CONCLUSION

An undercurrent in the petition and cross-petition is that barring students from having the option to include religious activities in school programs is inimical to religion. On the contrary, the Establishment Clause is designed to safeguard religion from government (at the same time it safeguards government from religious strife). "[A] union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. at 431. Students who today vote to insert prayer can tomorrow vote to denigrate prayer, and the strife that is likely to erupt in the school (and in the community) is precisely what the Establishment Clause intends to prevent.

The decision below is a faithful application of a fundamental principle. Accordingly, respondents respectfully request that this Court deny the petition and cross-petition for *certiorari*.

Respectfully submitted,

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